Supreme Court, U. S.
FILED
DEC 11 1979
MICHAEL RODAK, JR., CLERK

No. 79 —

IN THE

Supreme Court of the United States

October Term, 1979

79-907

LAWRENCE B. INGRAM, Secretary,
Department of Human Services of
New Mexico,

Petitioner,

v.

JACQUELINE NOLAN, *et al,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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December 11, 1979

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79 –

STATE OF NEW MEXICO and
FERNANDO C. de BACA,
Executive Director, Department of
Health and Social Services,
Petitioners,

v.

JACQUELINE NOLAN, *et al,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of New Mexico and its Executive Director of the Department of Health and Social Services[1] petition for a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Judgment (App. A, pp. 1a-2a) and Opinion (App. B, pp. 3a-6a) entered in this case by the United States District

1. Due to State reorganization, the petitioning department is now known as the Department of Human Services, pursuant to the Laws of New Mexico of 1977, Chapter 252. The present head of the department is Secretary Lawrence B. Ingram.

Court for the District of New Mexico on November 28, 1977 are unreported. The Opinion of the United States Court of Appeals for the Tenth Circuit (App. C, pp. 7a-11a) is reported at 603 F. 2d 810 (1979).

JURISDICTION

The Opinion and Judgment (App. D, p. 12a) of the United States Court of Appeals for the Tenth Circuit were filed on August 13, 1979. By order of October 29, 1979 Mr. Justice White extended the time within which to file a petition for a writ of certiorari to and including December 11, 1979 (App. E, p. 13a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. As a matter of New Mexico community property law, is community income, in the form of a paycheck made payable to the nominal wage earner and in the form of a G.I. Bill educational benefits check made payable to the nominally entitled veteran, the separate property of the spouse who nominally earned it, or does it belong equally to the members of the marital community?

2. Does H.S.S.D. Manual § 221.832, the State's regulation relating to the income of an applicant for AFDC benefits, conform to the principles of the State's community property law?

3. If, under State AFDC regulations which conform to State law, one-half of the community income belongs to the non-wage earning wife, do any federal statutes or regulations prohibit the State from counting her half-share of the community income in determining her children's eligibility for AFDC benefits?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment X

Amendment X to the Constitution of the United States provides that:

> *[Powers Reserved to States or People]*
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

H.S.S.D. Manual §221.832

H.S.S.D. Manual §221.832, of the New Mexico Health and Social Services Department Manual of Regulations, provides in pertinent part:

> 1. *Availability of income* – In determining whether the budget group is eligible for AFDC on the condition of need, income currently received by members of the household is considered available to the budget group in the amounts specified below. For purposes of this section an individual is considered a household member under the following circumstances: . . .
>
> a. *Division of Income between Spouses* – In keeping with the State's community property law, one half (½) the community property income of spouses is considered available to each spouse when they live together. The separate income of a spouse is considered available only to that spouse. . . . All income is considered as community property income unless the client can

demonstrate to the worker's satisfaction that it is separate income. . . .

b. *Income of a Parent* – The income of a parent (or the parent's share of income) is considered available to the AFDC budget group which includes the parent's children under age 21 when the parent and children live together. The amount of income so available is the amount that remains after deduction of the maintenance allowances described in paragraph C below.

* * *

45 C.F.R. §233.20 (a)(3)(ii)

45 C.F.R. §233.20 (a)(3)(ii), set forth at pp. 165-167 of volume 45 C.F.R. 201.0, revised as of October 1, 1978, provides in pertinent part:

(a) . . . A State Plan for . . . AFDC . . . must, as specified below:

(3) . . .

(ii) Provide that, in determining need and the amount of the assistance payment, after all policies governing the reserves and allowances and disregard or setting aside of income and resources referred to in this section have been uniformly applied:

(A) in determining need all remaining income and resources shall be considered in relation to the State's need standard;

(B) in determining financial eligibility and the amount of the assistance payment, all remaining income . . .

. . . and all resources may, at the State's option, be considered in relation to the State's need standard, or the State's payment standard.

* * *

(D) net income available for current use and currently available resources shall be considered; *income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance;*

(E) income and resources will be reasonably evaluated.

(emphasis added).

45 C.F.R. §233.20 (a)(3)(vi)

45 C.F.R. §233.20 (a)(3)(vi), set forth at p. 167 of volume 45 C.F.R. 201.0, revised as of October 1, 1978, provides in pertinent part:

(vi) . . . if the State agency hold relatives responsible for the support of applicants and recipients, . . . [i]n family groups living together, . . . *income of a parent is considered available for children under 21* . . .

(emphasis added).

45 C.F.R. §233.90 (a)

45 C.F.R. §233.90 (a), set forth at pp. 177-178 of volume 45 C.F.R. 201.0 revised as of October 1, 1978, provides in pertinent part:

(a) . . . A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, . . . will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent, who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support

the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State; nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from non-legally responsible individuals living in the household. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

42 U.S.C. §602 (a)(7)

42 U.S.C. §602 (a)(7), appearing at p. 636 of U.S.C. 1976 ed. Vol. 10, provides in pertinent part:

> (a) A State plan for aid and services to needy families with children must . . . (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, ...

Other Provisions

42 U.S.C. §601 and pertinent provisions of the New Mexico Community Property Act of 1973 and the New Mexico Declaratory Judgment Act are set forth in Appendix F, pp. 14a *et seq.*

STATEMENT OF THE CASE

A. Synopsis

This appeal raises the issue of preemption of a state regulation for the Aid to Families with Dependent Children (AFDC) program by federal statutes and regulations. Mrs. Nolan brought suit to enjoin New Mexico's Health and Social Services Department from enforcing the provisions of a department regulation which sought to apply some of New Mexico's community property law concepts to the AFDC program (R. Vol. I, p. 1). The trial court found the state community property regulation conflicted with 42 U.S.C. §602 (a), and the implementing regulation, 45 C.F.R. §233.90 (a), and granted summary judgment to Mrs. Nolan on the basis of the Supremacy Clause of the Constitution (R. Vol. I, p. 165). The department appealed to the Tenth Circuit, which affirmed (R. Vol. I, p. 169).

B. The Factual Background

The facts were stipulated to the District Court (R. Vol. I, p. 103). Mrs. Nolan resides in New Mexico with her husband and her three children by a previous marriage. Mr. Nolan has not adopted the children and under New Mexico law is not legally obligated to support them (R. Vol. I, pp. 103, 107).

Mrs. Nolan is an unemployed, full-time student at the University of New Mexico. She receives no wages nor paychecks made expressly payable to her as payee or co-payee (R. Vol. I, p. 104).

Mr. Nolan is also a full-time student at the University. He draws G.I. Bill income and receives income in the form of wages as a part-time employee (R. Vol. I, pp. 104, 124).

Under the State's community property regulation at issue herein, the children of Mrs. Nolan receive $2.00 a month and

qualify for medicaid benefits. The regulation counts one-half of the net amount of the checks made payable to Mr. Nolan as the income of Mrs. Nolan, which in turn is considered available for her support of her children (R. Vol. I, pp. 103, 105-106, 160).

C. Proceedings in the Courts Below

Invoking the jurisdiction of the United States District Court under 28 U.S.C. §§1331 and 1343 for claims alleged under 42 U.S.C. §1983 and 28 U.S.C. §2201, Mrs. Nolan challenged the validity of the department's community property regulation. She alleged in Count 1 of her complaint that the department's regulation conflicted with 42 U.S.C. §602 (a) and 45 C.F.R. §233.90 (a) and thus violated the supremacy clause of the United States Constitution (R. Vol. I, pp. 1-3).

The District Court granted summary judgment to Mrs. Nolan on count one, ruling that the State's regulation conflicted with 42 U.S.C. §602 (a) and 45 C.F.R. §233.90 (a) and was preempted under the supremacy clause (R. Vol. I, pp. 78, 159, 163).

The department appealed the decision, under 28 U.S.C. §1291, to the Tenth Circuit, which affirmed the district court (R. Vol. I, p. 169).

REASONS FOR GRANTING THE PETITION

The Court below has jeopardized New Mexico's ability to manage its welfare programs consistently with its community property laws, by striking down a valid AFDC income regulation of New Mexico's which is based on those laws and which is not in conflict with the United States Constitution, federal statutes, or federal regulations.

New Mexico's treatment of community income as income for AFDC purposes is not only consistent with, but mandated by,

federal statutes and regulations which require a State to consider as available all net income and resources of the applicant parent.

To illustrate, 42 U.S.C. §602 (a)(7), set forth *supra*, requires the State to take into account *any* income of the child or applicant parent, other than certain exceptions not relevant here. This statutory dictate is carried into the federal regulations. For instance, 45 C.F.R. §233.20 (a)(3)(ii), set forth *supra*, states that a State shall consider all net income and resources of the applicant both when actually available and when the applicant *has the legal ability to reach a liquidated sum.*

Also, 45 C.F.R. §233.20 (a)(3)(vi), set forth *supra*, notes that income of a parent is considered available for children under 21. Compare: H.S.S.D. Manual §221.832.1.b., set forth *supra.* Last of all, 45 C.F.R. §233.90 (a), set forth *supra*, requires that the income of an applicant child's parent will be considered available.

Thus, the latter federal regulation, far from defeating New Mexico's regulation as viewed by the opinions below, mandates it. For New Mexico's regulation focuses not on the stepparent Mr. Nolan's one-half share of the community income, which would clearly be forbidden. Rather, it focuses properly on the mother Mrs. Nolan's income, that is, on her one-half share of the community income.

The impact of this federal mandate on New Mexico can be gleaned from examining the State's property and marital law. Under settled New Mexico law, Mrs. Nolan has income. Her income consists of one-half of the community income she and her husband receive, that is, the wages and G.I. Bill benefits made payable to him. These wages and benefits are not his separate income as they would be characterized generally in separate property jurisdictions. Furthermore, her interest is

present and vested. *Hughes v. Hughes,* 91 N.M. 339, 573 P. 2d 1194 (1978).

This Court has recognized this substantive property concept which distinguishes the eight community property States from the other States. See *Poe v. Seaborn,* 282 U.S. 101 (1930); *Render v. Pfaff,* 282 U.S. 127 (1930); *Hopkins v. Bacon,* 282 U.S. 122 (1930); *United States v. Yazell,* 382 U.S. 341 (1966).

As owner of one-half of the community income, Mrs. Nolan has "title" to her income. Under New Mexico law, it is arguable that her husband as payee of the checks constituting their community income has sole management control over the entire community income. See §40-3-14 N.M.S.A. 1978, App. F, *infra,* at pp. 18a-19a.

However, such an argument is empty. Under §40-3-9 N.M.S.A. 1978, App. F, at p. 16a, Mrs. Nolan may encumber the community income by making credit purchases. Note the provision of §40-3-11.A. N.M.S.A. 1978, App. F, at p. 17a, as to priorities for satisfaction of community debts. Furthermore, under the New Mexico Declaratory Judgment Act, App. F, at pp. 19a-21a, Mrs. Nolan may obtain declaratory, injunctive relief if necessary to enforce her community income rights.

This Court in *Poe v. Seaborn* has affirmed the above points:

> The obligations of the husband as agent of the community are no less real because the policy of the state limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous with legal remedy. *The laws's investiture of the husband with broad powers by no means negatives the wife's present interest as a co-owner.*
>
> We are of opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could

> rightly be termed that of the wife. (282 U.S. at 113) (emphasis added).

Accordingly, Mrs. Nolan has income which the federal statutory and regulatory provisions allow, indeed compel, New Mexico to count for AFDC purposes. Certainly they do not constitute "clear and substantial interests" of the federal government which "will suffer major damage if the state law is applied." See *United States v. Yazell, supra,* at 352.

For it is clear from the above that Mrs. Nolan through her community income property rights either has income that is "actually available" or "has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance" of the children. See 45 CFR §233.20 (a) (3) (ii) (D) *supra.*

The Courts below ignored these points and thus misunderstood the basic nature of this case. This case is not a so-called "stepparent case" such as *Lewis v. Martin,* 397 U.S. 552 (1070) nor a "man-in-the-home case" such as *King v. Smith,* 392 U.S. 309 (1968). It is an *income* case. Thus, the cases cited by them as authority are not in point.

For example, *King v. Smith* did not deal with community property issues at all. *Lewis v. Martin* contained no language addressing any issue of community property or income. Although this Court's comments in *King* and *Lewis* that "Congress expected 'breadwinners' who secured employment would support their children", 392 U.S. at 328-330, 397 U.S. at 557-559, seem well-taken in the context of those two cases, they are not applicable to the instant case. Accordingly, *King* and *Lewis* should not be extended to this case.

For it is not enough to say that "Congress expected 'breadwinners' who secured employment would support their children" unless Congress actually and clearly intended to exclude

all income attributable to a natural parent from sources other then "employment". The petitioner, State of New Mexico, does not believe that is the case. In community property jurisdictions "breadwinners" are not the only persons who receive an income.

Hisquierdo v. Hisquierdo, ____U.S.____, 99 S. Ct. 802, 59 L.Ed. 2d 1 (1979), was also cited as authority by the Tenth Circuit Court of Appeals in their opinion below. *Hisquierdo* addressed the issue of community income only in the context of the Railroad Retirement Act of 1974, 88 Stat. 1305. The controlling aspect of *Hisquierdo* was the specific anti-attachment provision, § 231, of the Railroad Retirement Act. See *Hisquierdo* at 59 L.Ed. 2d 12. No such special language, statutory or otherwise, is present in the instant case.

Hisquierdo is distinguishable further. Whereas the Hisquierdo decision "prevents the vagaries of state law from disrupting the national scheme and guarantees a national uniformity that enhances the effectiveness of congressional policy", such a prophylactic consideration is inapplicable here. *Hisquierdo,* at 59 L.Ed. 2d 12. For Congress has expressly limited AFDC assistance in each State to the extent "as far as practical under the conditions in such State". 42 U.S.C. §601, *supra.* Although the States do not have unlimited state discretion in the AFDC scheme of cooperative federalism, nonetheless "[t]here is no question that States have considerable latitude in allocating their AFDC resources." *King v. Smith,* 392 U.S. 309, 318 (1968). Compare: *Doe v. Beal,* 523 F.2d 611 (3rd Cir. 1975), reversed on other grounds, 432 U.S. 439.

Furthermore, in *Yazell, supra,* this Court noted that:

> Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the Courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied . . .
>
> This Court's decisions applying "federal law" to supercede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation.
>
> None of these cases overrode state law in *the peculiarly state province of family or family-property arrangements.* 382 U.S. at 352-354. (emphasis added).

Finally, under the Tenth Amendment to the Constitution of the United States, the New Mexico regulation at issue herein should be construed to be valid. For this Court has recognized that under the Tenth Amendment "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry v. United States,* 421 U.S. 542, 547, note 7 (1975). The petitioner suggests that here, as in *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* 414 U.S. 117, 127 (1973), "the sensitive interrelationship between . . . federal and state sovereignties should not be overlooked, and "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' "

We cite the above Tenth Amendment principles not primarily to challenge the constitutionality of any federal statute or regulation, but principally to underscore the serious breach of State sovereignty posed by the decisions below. For if the Courts below had followed the Tenth Amendment caveats of *Fry* and *Merrill Lynch,* they would have upheld New Mexico's regulation by construing the relevant federal and state statutes and regulations as a harmonious whole.

CONCLUSION

The opinions below are seriously in error. They conflict in principle with this Court's decisions in *United States v. Yazell, Poe v. Seaborn, Fry v. United States,* and *Merrill Lynch, Pierce, Fenner & Smith v. Ware, supra,* and represent an unwarranted extension of *King v. Smith, Lewis v. Martin,* and *Hisquierdo v. Hisquierdo, supra.*

The issues in this case have not been decided before in any reported case.[2] The Court should accept this case for these reasons and because of the importance of New Mexico's right, in the absence of clearly conflicting federal interests, to govern

2. Three State cases with the same legal issues as the instant case are presently pending in the appellate courts of New Mexico: *Carmen Barela v. New Mexico Department of Human Services, Income Support Division,* No. 4059, Court of Appeals of New Mexico; *Isabel Duran v. New Mexico Department of Human Services, Income Support Division,* No. 4350, Court of Appeals of New Mexico; and *Lisa Harper v. New Mexico Department of Human Services, Income Support Division,* No. 4392, Court of Appeals of New Mexico. In the Barela case, the Court of Appeals ruled against the department on October 30, 1979 and denied a motion for rehearing on November 13, 1979. At the time of printing of this petition herein, the department intends to file by December 3, 1979 with the New Mexico Supreme Court a petition for writ of certiorari, in the Barela case. In the Duran case, notice of appeal was filed on October 25, 1979, with no briefs having been filed so far. In the Harper case, notice of appeal was filed on November 28, 1979, with no briefs having been filed so far.

its marital and property relationships free from unwarranted federal intrusion.

Respectfully submitted,

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December 11, 1979

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

November 28, 1977

JACQUELINE NOLAN, on Behalf of Herself and on Behalf of Her Minor Children, DANIEL SCHMITZ, DEBORAH SCHMITZ and DWAYNE SCHMITZ,

Plaintiff,

vs. No. 76-612-B Civil

FERNANDO C. de BACA, Individually and as Executive Director, New Mexico Department of Health and Social Services,

Defendant.

JUDGMENT

This matter having come on for consideration upon the Motion of plaintiff Jacqueline Nalan [*sic*] for summary judgment on Count One of her complaint in which she claims that H.S.S.D. Manual § 221.832 – B.l conflicts with the provisions of 42 U.S.C. § 602(a) and 45 C.F.R. § 233.90(a), and thus violates U. S. Const. art. VI, cl. 2; and the Court having filed herein its Memorandum Opinion finding that plaintiff is entitled to summary judgment on Count One of her complaint as a matter of law; Now, Therefore,

IT IS DECLARED AND ADJUDGED that Health and Social Services Department Manual § 221.832 – B. 1 conflicts with the provisions of 42 U.S.C. § 602(a) and 45 C.F.R. § 233.90(a) and thereby violates article VI, clause 2, of the United States Constitution.

IT IS THE FURTHER ORDER OF THE COURT that the defendant Fernando C. de Baca, individually and as Executive Director of the New Mexico Department of Health and Social Services, and his agents, employees, and representatives be, and they hereby are, permanently enjoined from enforcing Health and Social Services Department Manual § 221.832 – B.1 as against plaintiff Jacqueline Nolan and her three minor children Daniel Schmitz, Deborah Schmitz and Dwayne Schmitz.

IT IS THE FURTHER ORDER that each side bear its own costs of action.

/s/ Howard C. Bratton
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

November 28, 1977

JACQUELINE NOLAN, on Behalf of Herself and on Behalf of Her Minor Children, DANIEL SCHMITZ, DEBORAH SCHMITZ and DWAYNE SCHMITZ,

Plaintiff,

vs. No. 76-612-B Civil

FERNANDO C. de BACA, Individually and as Executive Director, New Mexico Department of Health and Social Services,

Defendant.

MEMORANDUM OPINION

This matter is before the Court upon the plaintiff's motion for summary judgment on Count One of her complaint. In that count it is alleged that a regulation of the New Mexico Health and Social Services Department [hereinafter H.S.S.D.] conflicts with provisions of the Social Security Act, 42 U.S.C. § 602(a), and regulations promulgated thereunder, particularly 45 C.F.R. § 233.90(a), and thus violates the supremacy clause of the United States Constitution.

The facts material to a resulution [*sic*] of this issue are not in dispute and are as follows.

The plaintiff has three minor children, living with her and her present husband. Her present husband has not adopted the children and, under the laws of New Mexico, is not legally

obligated to support them. Plaintiff is a full-time student at the University of New Mexico and has no independent income. Her husband, who is also a full-time student at the University, draws G. I. bill income and earns other income as a part-time worker at a local lumber company.

The natural father of the three children lives outside the state of New Mexico and has not provided any support for them, so that, since 1971, plaintiff has been receiving income assistance for her three children pursuant to the Aid to Families with Dependent Children [hereinafter A.F.D.C.] administered by the defendant director of H.S.S.D.

In October of 1976, H.S.S.D. notified plaintiff A.F.D.C. assistance to her three children was being reduced from $163.00 per month, the amount then being received, to $2.00 per month. The basis for the reduction was the operation of a new H.S.S.D. regulation,[1] under which one-half of the

---

[1] H.S.S.D. Manual § 221.832 – B.1 provides:

1. **Availability of income** – In determining whether the budget group is eligible for AFDC on the condition of need, income currently received by members of the household is considered available to the budget group in the amounts specified below. For purposes of this section an individual is considered a household member under the following circumstances: . . .

a. **Division of Income between Spouses** – In keeping with the State's community property law, one half (1/2) the community property income of spouses is considered available to each spouse when they live together. The separate income of a spouse is considered available only to that spouse. "Separate income" is income (1) that is derived from property acquired before marriage and not since converted to community property or (2) that is kept separate by one spouse and is not used to meet common expenses or debts of both spouses. All income is considered as community property income unless the client can demonstrate to the worker's satisfaction that it is separate income . . . .

b. **Income of a Parent** – The income of a parent (or the parent's share of income) is considered available to the AFDC budget group which includes the parent's children under age 21 when the parent and children live together. The amount of income so available is the amount that remains after deduction of the maintenance allowances described in paragraph e below. . . .

community property income of spouses is considered available to each spouse when they live together. In essence, H.S.S.D. attributed one-half of the net income of plaintiff's husband to her, and, after deducting from this sum an allowance for her support, attributed the balance as available to meet the needs of her three children. When this sum was subtracted from the figure representing the defendant's dollar determination of the children's needs, and the percentage of those needs which would be met by H.S.S.D. was applied, the assistance grant was $2.00.

This entire procedure was conducted without inquiry into whether the plaintiff's husband was in fact making any of the income he received available to the three children.

Section 602(a) of the Social Security Act provides the pertinent guidelines under which states must determine the need of a child in whose behalf aid is being claimed, and the provisions of Section 233.90 of Title 45 of the Code of Federal Regulations detail the specific requirements to be considered. Section 233.90 requires that a state determination of whether a child is eligible for benefits must be made by considering only the income of the child's natural or adoptive parent, or of a person married to the child's natural or adoptive parent who is legally obligated under state law to support the child to the same extent as would a natural or adoptive parent. That section further provides that the presence of any other individual in the family or household may not be used to assume that any of that person's income is available to the child, in the absence of proof of actual contributions by such person.

When the state regulation is assessed under the criteria set forth in Section 233.90, it is clear that the state's regulation contravenes its provisions and those of the Social Security Act. It is agreed in the present action that the income in question

is that of plaintiff's husband, that he has not adopted plaintiff's three children, and that he has no obligation under state law to support them. The assumption that New Mexico's community property laws may give plaintiff an interest of some kind in his income is not sufficient to bring the regulation into compliance with the federal requirements. It does not rise to the level of a state law requiring a non-adopting stepfather to support his stepchildren to the same extent that natural or adoptive parents are required to support their children. This is what is required by Section 233.90 in order to consider his income as available to the children in any regard, and, in its absence, the state may look to the income of plaintiff's husband as a means of reducing benefits to her children only where he has made actual contributions to their support from it. *Lewis v. Martin,* 397 U.S. 552 (1970); *Reyna v. Vowell,* 470 F.2d 494, 466 (5th Cir. 1972); *Woods v. Miller,* 318 F.Supp. 510 (W.D.Pa. 1970). The state regulation admittedly operates without inquiry into such factual data.

In view of the above conclusion, it is unnecessary to further consider the plaintiff's other challenges to the regulation. Accordingly, the regulation will be declared to be in violation of 42 U.S.C.A. § 602(a) and the regulations promulgated pursuant thereto and its enforcement against the plaintiff's three minor children will be permanently enjoined.

/s/ Howard C. Bratton
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 13, 1979

JACQUELINE NOLAN, on behalf of herself
and on behalf of her minor children,
DANIEL SCHMITZ, DEBORAH SCHMITZ and
DWAYNE SCHMITZ,
Plaintiff-Appellee,

vs.

No 78-1061

FERNANDO C. de BACA, individually and
as Executive Director, New Mexico
Department of Health and Social Services,
Defendant-Appellant.

Per Curiam.

This appeal raises the issue of preemption of a state regulation for the Aid to Families with Dependent Children (AFDC) program by a federal statute and regulation. The plaintiff brought suit to enjoin New Mexico's Health and Social Services Department from enforcing the provisions of a Department regulation which sought to apply some of New Mexico's community property law concepts to the AFDC program. The trial court found the state community property regulation conflicted with 42 U.S.C. § 602(a), and the implementing regulation, 45 C.F.R. § 233.90(a), and granted summary judgment to the plaintiff on the basis of the Supremacy Clause of the Constitution.

The facts were stipulated to the court. Mrs. Nolan resides in New Mexico with her husband and her three children by a previous marriage. Mr. Nolan has not adopted the children, and

under New Mexico law is not legally obligated to support them. Mrs. Nolan is an unemployed full-time student at the University of New Mexico. She has no income of her own and does not receive child support payments from the natural father. Mr. Nolan is also a full-time student at the University, but he works part time. He does not voluntarily or regularly provide the children with support.

The children generally qualify for AFDC assistance. Prior to promulgation of the community property regulation, the assistance grant was $163.00 per month. The figure was based on lack of any income of Mrs. Nolan and no income actually available from Mr. Nolan. Under the new community property regulation, the grant became $2.00 a month. The regulation counted one-half of Mr. Nolan's income as the income of Mrs. Nolan, which in turn was considered available to meet the needs of the children.

Appellant raises three issues here. He first asserts procedural error in the trial court's denial of the request for oral argument on the motion for summary judgment. He then maintains that summary judgment was improper because the trial court misconstrued a stipulation of fact, and lastly, that the substantive analysis is incorrect. We find no procedural error and conclude that the community property regulation does conflict with federal law. We, therefore, affirm the judgment below.

Local Rule 9(i) of the United States District Court for New Mexico permits the trial judge to dispense with a hearing at his discretion. There is no requirement for a hearing in Fed.R. Civ. P. 56(c), although it does refer for notice purposes to the "time fixed for hearing."

There was no time set for hearing and no hearing, but there was more than adequate opportunity provided. We have previously held that failure to abide by the time requirement of Rule 56(c) denies a trial court authority to enter summary

judgment. Dolese v. United States, 541 F.2d 853 (10th Cir.); Mustang Fuel Corp. v. Youngstown Sheet and Tube Co., 480 F.2d 607 (10th Cir.). However, we specifically noted in *Mustang* that "[u]nder proper circumstances these requirements of the Rule may be waived." This case rather obviously presents the proper circumstances. Summary judgment was granted approximately six months after the motion was filed. Almost thirteen months transpired between the filing of the complaint and the rendering of judgment. The parties briefed the issues extensively, filed affidavits, and stipulated the facts. We cannot say denial of oral argument was improper under these circumstances, and a setting for a day certainly was not required. Although Dredge Corporation v. Penny, 338 F.2d 456 (9th Cir.), is to the contrary, we think the sounder rule is that followed here and in Benson v. Matthews, 554 F.2d 860 (8th Cir.); Kibort v. Hampton, 538 F.2d 90 (5th Cir.); Spark v. Catholic University of America, 510 F.2d 1277 (D.C. Cir.); and similar cases in the Third, Sixth and Seventh Circuits. *See* 6 Moore's Federal Practice Par. 56.14[1], at 56-360. *See also* the holding on the *sua sponte* judgment in United States v. Fisher-Otis Company, Inc., 496 F.2d 1146 (10th Cir.); the combination of factors in Dolese v. United States, 541 F.2d 853 (10th Cir.); and our opinion in Hazen v. Southern Hills National Bank of Tulsa, 414 F.2d 778 (10th Cir.), on a motion to dismiss.

The basic issue here is, of course, whether the regulations conflict. There are no material issues of fact remaining which would preclude summary judgment. Fitzgerald v. General Dairies, Inc., 590 F.2d 874 (10th Cir.); Bruce v. Martin-Marietta Corp., 544 F.2d 442 (10th Cir.). Appellant disagrees apparently because of a sentence contained in the memorandum opinion which reads, "It is agreed in the present action that the income in question is that of plaintiff's husband . . . ." He argues that the essence of his position is that Mrs. Nolan has an income by

law since under community property concepts a wife has a half-interest in the husband's income. He thus believes the quoted sentence reveals the trial court's misconception of the case. This is obviously not so. We are of the opinion that the sentence merely reiterates the fact that only Mr. Nolan *received* an income. There was no material issue of fact remaining. The trial court's analysis is correct. As a starting point, it has long been recognized that the state implementing regulations for the AFDC program may not contravene Social Security Act provisions or valid HEW regulations. King v. Smith, 392 U.S. 309. There is no question that the pertinent HEW regulation, 45 C.F.R. § 233.90(a), is valid. *See* Lewis v. Martin, 397 U.S. 552. *See also* the consideration of the California community property law in the Railroad Retirement Act case of Hisquierdo v. Hisquierdo, ____U.S.____, 47 U.S.L.W. 4141.

The New Mexico regulation, HSSD Manual § 221.832 B.1, provides in part:

> "1. **Availability of Income** – In determining whether the budget group is eligible for AFDC on the condition of need, income currently received by members of the household is considered available to the budget group in the amounts specified below. . . .
>
> . . .
>
> "a. **Division of Income between Spouses** – In keeping with the State's community property law, one half (1/2) the community property income of spouses is considered available to each spouse when they live together. . . ."

The pertinent HEW regulation, 45 C.F.R. § 233.90(a), sets forth what a state may consider in computing the AFDC assistance. Establishing these requirements is within the province of the federal government. The regulation clearly limits a state to considering only actual contributions to the budget

group, the income of the natural or adoptive parent, and the income of a stepparent legally obligated by state law to provide support.

Operation of appellant's community property regulation obviously contravenes the federal act and HEW's regulation. The income of Mr. Nolan, a non-adoptive stepparent who does not voluntarily contribute to the children's needs, is considered in determining the assistance grant. The regulation has no requirement for determining if Mr. Nolan voluntarily and actually contributes to the children's needs. Arguing that Mrs. Nolan has income under community property does not change the impact of the community property regulation. We see little distinction between the community property regulation and California's AFDC regulation which the Supreme Court ruled invalid in Lewis v. Martin, 397 U.S. 552, and *Hisquierdo.* In *Lewis,* the invalid regulation conclusively presumed that the income of a non-adoptive stepparent is available to the children. Here, the regulation conclusively presumes one-half of the non-adoptive stepparent's income is available, albeit through the other spouse's so-called community property income interest. Arguing legal concepts of income does not change what in reality occurs with this regulation. We are of the opinion that Lewis v. Martin, 397 U.S. 552, and King v. Smith, 392 U.S. 309, require the result reached here.

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JULY TERM – August 13, 1979

Before Honorable Oliver Seth, Chief Judge, Honorable Robert H. McWilliams and Honorable James E. Barrett, Circuit Judges

JACQUELINE NOLAN, on behalf of herself and on behalf of her minor children, DANIEL SCHMITZ, DEBORAH SCHMITZ and DWAYNE SCHMITZ, Plaintiff-Appellee, vs. FERNANDO C. de BACA, individually and as Executive Director, New Mexico Department of Health and Social Services, Defendant-Appellant.	)	JUDGMENT No. 78-1061 (D.C. No. 76-612-B)

This cause came on to be heard on the record on appeal from the United States District Court for the _____ District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-364

FERNANDO C. de BACA,
Petitioner,

v.

JACQUELINE NOLAN

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner~~(s)~~,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 11, 1979.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 29th
day of October, 19 79.

APPENDIX F

42 U.S.C. §601

42 U.S.C. §601, appearing at p. 635 of U.S.C. 1976 ed., Vol. 10, provides:

§601. Authorization of appropriations

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

New Mexico Community Property Act

Pertinent parts of the New Mexico Community Property Act of 1973, being § §40-3-6 to 40-3-17 N.M.S.A. 1978 compilation and appearing at pp. 20-32 of Original Pamphlet 62, provide:

40-3-6. Short title.

This act [40-3-6 to 40-3-17 NMSA 1978] may be cited as the "Community Property Act of 1973."

40-3-7. Purpose of act.

The purpose of the Community Property Act of 1973 [40-3-6 to 40-3-17 NMSA 1978] is to comply with the provisions of Section 18 of Article 2 of the constitution of New Mexico, as it was amended in 1972 and became effective on July 1, 1973, by making the provisions of the community property law of New Mexico apply equally to all persons regardless of sex.

40-3-8. Classes of property.

A. "Separate property" means:

(1) property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage;

(2) property acquired after entry of a decree entered pursuant to Section 40-4-3 NMSA 1978 unless the decree provides otherwise;

(3) property designated as separate property by a judgment or decree of any court having jurisdiction;

(4) property acquired by either spouse by gift, bequest, devise or descent;

(5) property designated as separate property by a written agreement between the spouses; and

(6) each spouse's undivided interest in property owned in whole or in part by the spouses as cotenants in tenancy in common.

B. "Community property" means property acquired by either or both spouses during marriage which is not separate property.

C. "Property" includes the rents, issues and profits thereof.

D. The right to hold property as joint tenants in common and the legal incidents of so holding, including but not limited to the incident of the right of survivorship of joint tenancy, are not altered by the Community Property Act of 1973 [40-3-6 to 40-3-17 NMSA 1978], except as provided in Sections 40-3-10, 40-3-11 and 40-3-13 NMSA 1978.

40-3-9. Definition of separate and community debts.

A. "Separate debt" means:

(1) a debt contracted or incurred by a spouse before marriage or after entry of a decree of dissolution of marriage;

(2) a debt contracted or incurred by a spouse after entry of a decree entered pursuant to Section 40-4-3 NMSA 1978 unless the decree provides otherwise;

(3) a debt designated as a separate debt of a spouse by a judgment or decree of any court having jurisdiction;

(4) a debt contracted by a spouse during marriage which is identified by a spouse to the creditor in writing at the time of its creation as the separate debt of the contracting spouse; or

(5) a debt which arises from a tort committed by a spouse before marriage or after entry of a decree of dissolution of marriage or a separate tort committed during marriage.

B. "Community debt" means a debt contracted or incurred by either or both spouses during marriage which is not a separate debt.

40-3-10. Priorities for satisfaction of separate debts.

A. The separate debt of a spouse shall be satisfied first from the debtor spouse's separate property, excluding that spouse's interest in property in which each of the spouses owns an undivided equal interest as a joint tenant or tenant in common. Should such property be insufficient, then the debt shall be satisfied from the debtor spouse's one-half interest in the community property or in property in which each spouse owns an undivided equal interest as a joint tenant or tenant in common, excluding the residence of the spouses. Should such property be insufficient, then the debt shall be satisfied from the debtor spouse's interest in the residence of the spouses, except as provided in Section 42-10-9 NMSA 1978. Neither spouse's interest in

community property or separate property shall be liable for the separate debt of the other spouse.

B. The priorities or exemptions established in this section for the satisfaction of a separate debt must be claimed by either spouse under the procedure set forth in Section 42-10-13 NMSA 1978, or the right to claim such priorities or exemptions is waived as between a spouse and the creditor.

C. This section shall apply only while both spouses are living, and shall not apply to the satisfaction of debts after the death of one or both spouses.

40-3-11. Priorities for satisfaction of community debts.

A. Community debts shall be satisfied first from all community property and all property in which each spouse owns an undivided equal interest as a joint tenant or tenant in common, excluding the residence of the spouses. Should such property be insufficient, community debts shall then be satisfied from the residence of the spouses, except as provided in Section 42-10-9 NMSA 1978. Should such property be insufficient, only the separate property of the spouse who contracted or incurred the debt shall be liable for its satisfaction. If both spouses contracted or incurred the debt, the separate property of both spouses is jointly and severally liable for its satisfaction.

B. The priorities or exemptions established in this section for the satisfaction of community debts must be claimed by either spouse under the procedure set forth in Section 42-10-13 NMSA 1978 or the right to claim such priorities or exemptions is waived as between a spouse and the creditor.

C. This section shall apply only while both spouses are living, and shall not apply to the satisfaction of debts after the death of one or both spouses.

40-3-12. Presumption of community property; presumption of separate property where property acquired by married woman prior to July 1, 1973.

A. Property acquired during marriage by either husband or wife, or both, is presumed to be community property.

* * *

40-3-14. Management and control of other community personal property.

A. Except as provided in Subsections B and C of this section, either spouse alone has full power to manage, control, dispose of and encumber the entire community personal property.

B. Where only one spouse is:

(1) named in a document evidencing ownership of community personal property; or

(2) named or designated in a written agreement between that spouse and a third party as having sole authority to manage, control, dispose of or encumber the community personal property which is described in or which is the subject of the agreement, whether the agreement was executed prior to or after July 1, 1973; only the spouse so named may manage, control, dispose of or encumber the community personal property described in such a document evidencing ownership or in such a written agreement.

C. Where both spouses are:

(1) named in a document evidencing ownership of community personal property; or

(2) named or designated in a written agreement with a third party as having joint authority to dispose of or encumber the community personal property which is described in or the subject of the agreement, whether the agreement was executed prior to or after July 1, 1973; both spouses must join to dispose of or encumber such community personal property where the names of the

spouses are joined by the word "and." Where the names of the spouses are joined by the word "or," or by the words "and/or," either spouse alone may dispose of or encumber such community personal property.

New Mexico Declaratory Judgment Act

Pertinent parts of the New Mexico Declaratory Judgment Act, being §§44-6-1 to 44-6-15 N.M.S.A. 1978 compilation and appearing at pp. 41-47 of Original Pamphlet 66, provide:

44-6-1. Short title.

This act [44-6-1 to 44-6-15 NMSA 1978] may be cited as the "Declaratory Judgment Act."

44-6-2. Scope.

In cases of actual controversy, district courts within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect and shall have the force and effect of a final judgment or decree.

44-6-3. Definition.

As used in the Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978], "person" means any person, partnership, joint stock company, unincorporated association or society or municipal or other corporation of any character whatsoever.

44-6-4. Power to construe.

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a

statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

44-6-5. Contract construction.

A contract may be construed either before or after there has been a breach thereof.

44-6-6. Enumeration not exclusive.

The enumeration in Section 4 [44-6-4 NMSA 1978] and 5 [44-6-5 NMSA 1978] of the Declaratory Judgment Act does not limit or restrict the exercise of the general powers conferred in Section 2 [44-6-2 NMSA 1978], in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

44-6-7. Discretionary.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

* * *

44-6-9. Supplemental relief.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

* * *

44-6-12. Parties.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

44-6-13. State or official may be sued; construction of constitution or statute.

For the purpose of the Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978], the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico, the constitution of the United States or any of the laws of the state of New Mexico or the United States, or any statute thereof.

44-6-14. Construction.

The Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978] is declared to be remedial. The act's purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered.

44-6-15. Uniformity of interpretation.

The Declaratory Judgment Act [44-6-1 to 44-6-15 NMSA 1978] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.